JUDGE TORRES

14 CV 3936

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHKIE LEE,
on behalf of himself,
FLSA Collective Plaintiffs and the Class,

Plaintiff,

v.

LILIS 200 WEST 57TH CORP.,
792 RESTAURANT FOOD CORP.,
ALAN PHILLIPS,
JONAH PHILLIPS and
SIEW MOY LOW,

Defendants.

Case No.:
CLASS AND COLLECTIVE ACTION COMPLAINT

Jury Trial Demanded

Plaintiff, JOHKIE LEE ("Plaintiff"), on behalf of himself and others similarly situated, by and through the undersigned attorneys, hereby files this class and collective action Complaint against Defendants, LILIS 200 WEST 57TH CORP., 792 RESTAURANT FOOD CORP., (together the "Corporate Defendants"), ALAN PHILLIPS, JONAH PHILLIPS and SIEW MOY LOW (together the "Individual Defendants") (the Corporate Defendants and Individual Defendants are each individually referred to as a "Defendant" and collectively "Defendants") and states as follows:

INTRODUCTION

1. Plaintiff alleges, pursuant to the Fair Labor Standards Act, as amended, 29 U.S.C. §§201 *et. seq.* ("FLSA"), that he is entitled to recover from Defendants: (1) unpaid minimum wage, (2) unpaid overtime, (3) unpaid wage due to time shaving, (4) liquidated damages and (5) attorneys' fees and costs.

2. Plaintiff further alleges that, pursuant to the New York Labor Law ("NYLL"), he is entitled to recover from Defendants: (1) unpaid minimum wage, (2) unpaid overtime, (3) unpaid wage due to time shaving, (4) unpaid spread of hours premium, (5) liquidated damages, (6) statutory penalties and (7) attorneys' fees and costs.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this controversy pursuant to 29 U.S.C. §216(b), 28 U.S.C. §§1331, 1337 and 1343, and has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. §1367.

4. Venue is proper in the Southern District pursuant to 28 U.S.C. §1391.

PARTIES

5. Plaintiff, JOHKIE LEE, is a resident of New York County, New York.

6. Corporate Defendants:

   a. LILIS 200 WEST 57th CORP. is a corporation organized under the laws of the State of New York, doing business as "Lili's 57 Asian Cuisine & Sushi Bar" ("Lili's 57") with a principal place of business located at 200 West 57th Street, New York, NY 10019; and

   b. 792 RESTAURANT FOOD CORP. is a corporation organized under the laws of the State of New York, doing business as "Lili and Loo Chinese Asian Cuisine & Sushi

Bar" ("Lili and Loo") with a principal place of business located as 792 Lexington Avenue, New York, NY 10021; and

7. Individual defendants:

   a. ALAN PHILLIPS is the Chairman or Chief Executive Officer of both Corporate Defendants. Plaintiff was hired directly by ALAN PHILLIPS.

   b. SIEW MOY LOW is a principle of both Corporate Defendants.

   c. JONAH PHILLIPS is a principle of Corporate Defendant, 792 RESTAURANT FOOD CORP.

8. The Individual Defendants exercised control over the terms and conditions of the Plaintiff, FLSA Collective Plaintiffs and Class members. Each of the Individual Defendants exercised the power and authority to

   a. fire and hire;

   b. determine rate and method of pay;

   c. determine work schedules;

   d. supervise and control supervisors of Plaintiff, the FLSA Collective Plaintiffs and the Class members and

   e. otherwise affect the quality of employment, of Plaintiff, the FLSA Collective Plaintiffs and the Class members.

9. Lili's 57 Asian Cuisine & Sushi Bar and Lili and Loo Chinese Asian Cuisine & Sushi Bar are operated by Defendants as a common enterprise. Employees were freely interchangeable between the two locations. For instance, Plaintiff and many other wait staffs worked at both restaurants.

10. At all relevant times, each of the Corporate Defendants was and continues to be an "enterprise engaged in commerce" within the meaning of the FLSA.

11. At all relevant times, the work performed by Plaintiff was directly essential to the business operated by Defendants.

FLSA COLLECTIVE ACTION ALLEGATIONS

12. Plaintiff brings claims for relief as a collective action pursuant to FLSA Section 16(b), 29 U.S.C. § 216(b), on behalf of all non-exempt persons employed by Defendants on or after the date that is six years before the filing of the Complaint in this case as defined herein ("FLSA Collective Plaintiffs").

13. At all relevant times, Plaintiff and the other FLSA Collective Plaintiffs are and have been similarly situated, have had substantially similar job requirements and pay provisions, and are and have been subjected to Defendants' decisions, policies, plans, programs, practices, procedures, protocols, routines, and rules, all culminating in a willful failure and refusal to pay (a) the proper minimum wage to tipped employees due to an invalid tip credit allowance; (b) the proper overtime premium at the rate of one and one half times the regular rate for work in excess of forty (40) hours per workweek; (c) the unpaid wage due to time shaving. The claims of Plaintiff stated herein are essentially the same as those of the other FLSA Collective Plaintiffs.

14. The claims for relief are properly brought under and maintained as an opt-in collective action pursuant to §16(b) of the FLSA, 29 U.S.C. 216(b). The FLSA Collective Plaintiffs are readily ascertainable. For purposes of notice and other purposes related to this action, their names and addresses are readily available from the Defendants. Notice can be provided to the FLSA Collective Plaintiffs via first class mail to the last address known to Defendants.

RULE 23 CLASS ALLEGATIONS – NEW YORK

15. Plaintiff brings claims for relief pursuant to the Federal Rules of Civil Procedure ("F.R.C.P.") Rule 23, on behalf of all non-exempt persons employed by Defendants at each of their business locations on or after the date that is six years before the filing of the Complaint in this case as defined herein (the "Class Period").

16. All said persons, including Plaintiff, are referred to herein as the "Class." The Class members are readily ascertainable. The number and identity of the Class members are determinable from the records of Defendants. The hours assigned and worked, the position held, and rates of pay for each Class member are also determinable from Defendants' records. For purposes of notice and other purposes related to this action, their names and addresses are readily available from Defendants. Notice can be provided by means permissible under F.R.C.P. 23.

17. The proposed Class is numerous that a joinder of all members is impracticable, and the disposition of their claims as a class will benefit the parties and the Court. Although the precise number of such persons is unknown, the facts upon which the calculation of that number are based are presently within the sole control of Defendants, and there is no doubt that there are more than forty (40) members of the Class.

18. Plaintiff's claims are typical of those claims that could be alleged by any member of the Class and the relief sought is typical of the relief that would be sought by each member of the Class in separate actions. All the Class members were subject to the same corporate practices of Defendants, as alleged herein, of (i) failing to pay tipped Class member the proper minimum wage, (ii) failing to pay Class members the proper overtime premium at the rate of one and one half times the regular rate for work in excess of forty (40) hours per workweek, (iii) failing to pay Class member for hours worked due to time shaving, (iv) failing to pay "spread of hours"

premium, (v) failing to provide proper notice to employees, including rate of compensation, trade name of employer, among others, at the beginning of employment and annually thereafter pursuant to the requirements of the New York Labor Law and (vi) failing to provide proper wage statements to Class members that are in compliance with the requirements of the New York Labor Law. Defendants' corporate-wide policies and practices affected all Class members similarly, and Defendants benefited from the same type of unfair and/or wrongful acts as to each Class member. Plaintiff and other Class members sustained similar losses, injuries and damages arising from the same unlawful policies, practices and procedures.

19. Plaintiff is able to fairly and adequately protect the interests of the Class and has no interests antagonistic to the Class. Plaintiff is represented by attorneys who are experienced and competent in both class action litigation and employment litigation and have previously represented plaintiffs in wage and hour cases.

20. A class action is superior to other available methods for the fair and efficient adjudication of the controversy – particularly in the context of the wage and hour litigation where individual class members lack the financial resources to vigorously prosecute a lawsuit against corporate defendants. Class action treatment will permit a large number of similarly situated persons to prosecute common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of efforts and expense that numerous individual actions engender. Because of losses, injuries and damages suffered by each of the individual Class members are small in the sense pertinent to a class action analysis; the expenses and burden of individual litigation would make it extremely difficult or impossible for the individual Class members to redress the wrongs done to them. On the other hand, important public interests will be served by addressing the matter as a class action. The adjudication of individual litigation claims would

result in a great expenditure of Court and public resources; however, treating the claims as a class action would result in a significant saving of these costs. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent and/or varying adjudications with respect to the individual members of the Class, establishing incompatible standards of conduct for Defendant and resulting in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties. The issues in this action can be decided by means of common, class-wide proof. In addition, if appropriate, the Court can, and is empowered to, fashion methods to efficiently manage this action as a class action.

21. Defendants and other employers throughout the state violate the New York Labor Law. Current employees are often afraid to assert their rights out of fear of direct or indirect retaliation. Former employees are fearful of bringing claims because doing so can harm their employment, future employment, and future efforts to secure employment. Class actions provide class members who are not named in the Complaint a degree of anonymity, which allows for the vindication of their rights while eliminating or reducing these risks.

22. There are questions of law and fact common to the Class which predominate over any questions affecting only individual class members, including:

a. Whether Defendants employed Plaintiff and the Class within the meaning of the New York law;

b. What are and were the policies, practices, programs, procedures, protocols and plans of Defendants regarding the types of work and labor for which Defendants did not pay the Class members properly;

c. At what common rate, or rates subject to common methods of calculation, was and are Defendants required to pay the Class members for their work;

d. Whether Defendants provided proper wage statements informing employees of information required to be provided on wage statements as required under the New York Labor Law;

e. Whether Defendants provided proper wage notices at time of hiring and annually thereafter as required under New York Labor Law;

f. Whether Defendants properly compensated Plaintiff and tipped Class members for minimum wage under New York State and Federal law;

g. Whether Defendants properly compensated Plaintiff and Class members for overtime under New York State and Federal law; and

h. Whether Defendants paid Plaintiff and the Class members the New York State "spread of hours" premium when their workdays exceeded ten hours.

STATEMENT OF FACTS

23. On or about September, 2013, Plaintiff, JOHKIE LEE, was hired by Maggie [LNU], manager of Lili and Loo Restaurant, to work as a waiter. Although Plaintiff was not informed at the beginning of his employment that he need to work at two different locations, after about a week he was instructed by Maggie [LNU] to work for Lili's 57 Restaurant at the same position from time to time. Although he worked for Defendant's two restaurants during the same period, he only worked at one location a day. Plaintiff worked for Defendants until on or about October, 2013.

25. During Plaintiff's employment with Defendants, he worked more than 40 hours a week. Although his schedule varied from day to day, he generally worked 5 days for about 45 hours a week. And Plaintiff's workday exceeded ten hours 2 times per week.

26. Defendants knowingly and willfully operated their business with a policy of not paying Plaintiff and Class members based on their actual working hours. The working hours stated on Plaintiff's paystubs were less than the hours he actually worked. Although he worked 45 hours per week, he was only paid 40 hours per week. Also, Plaintiff's weekly working hours were listed on two separate paystubs (one from each restaurant he worked) and were never added together to calculate for overtime hours. FLSA Collective Plaintiffs and Class members suffered from the same policies.

27. For the hours Defendants did pay Plaintiff, he was paid $5 per hour, which is the "Tip Credit" minimum wage. However, Defendants were not entitled to take any tip credits under the FLSA or NYLL, because they (i) failed to properly provide notice to all tipped employees that Defendants were taking a tip credit in violation of the FLSA and NYLL, (ii) failed to provide proper wage statements informing tipped employees of the amount of tip credit taken for each payment period in violation of the NYLL Plaintiff never received any tip credit notice from Defendants.

28. Plaintiff, the FLSA Collective Plaintiffs, and members of the Class were all similarly paid on a straight time basis and were not compensated at the statutory overtime rate for hours worked over forty per week.

29. Plaintiff, the FLSA Collective Plaintiffs, and members of the Class often worked in excess of forty hours per week. The workdays of Plaintiff, the FLSA Collective Plaintiffs, and members of the Class regularly exceeded ten hours.

30. Defendants knowingly and willfully operated their business with a policy of not paying either the FLSA minimum rate or the New York State minimum rate to the Plaintiff, FLSA Collective Plaintiffs and Class members due to an invalid tip credit allowance.

31. Defendants knowingly and willfully operated their business with a policy of not paying either the FLSA or the New York State overtime premium to Plaintiff and Class members at the rate of one and one half times the regular rate for work in excess of forty (40) hours per workweek.

32. Defendants knowingly and willfully operated their business with a policy of time shaving and refusing to pay Plaintiff and Class members for all their compensation earned due to off-the-clock work.

33. Defendants knowingly and willfully operated their business with a policy of not paying the New York State "spread of hours" premium to Plaintiff and Class members when their work days exceed ten hours.

34. Defendants knowingly and willfully operated their business with a policy of refusing to provide proper wage notices to Plaintiff and Class Members. Plaintiff did not receive any wage notice at the beginning of his employment.

35. Defendants knowingly and willfully operated their business with a policy of refusing to provide proper wage statement to Plaintiff and Class Members. Also, the wage statements provided by Defendants did not reflect the actual hours Plaintiff worked.

36. Plaintiff retained Lee Litigation Group, PLLC to represent Plaintiff, FLSA Collective Plaintiffs and Class members, in this litigation and has agreed to pay the firm a reasonable fee for its services.

STATEMENT OF CLAIM

COUNT I

VIOLATION OF THE FAIR LABOR STANDARDS ACT

37. Plaintiff realleges and reavers Paragraphs 1 through 36 of this class and collective action Complaint as if fully set forth herein.

38. At all relevant times, Defendants were and continue to be employers engaged in interstate commerce and/or the production of goods for commerce within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a). Further, Plaintiff and FLSA Collective Plaintiffs are covered individuals within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a).

39. At all relevant times, Defendants employed Plaintiff and FLSA Collective Plaintiffs within the meaning of the FLSA.

40. At all relevant times, each of the Corporate Defendants had gross annual revenues in excess of $500,000.

41. At all relevant times, the Defendants had a policy and practice of refusing to pay minimum wage to Plaintiff and FLSA Collective Plaintiffs for their hours worked. This violation was willful in that Defendants know or should have known that such was due.

42. At all relevant times, the Defendants had a policy and practice of refusing to pay overtime compensation at the statutory rate of time and one-half to Plaintiff and FLSA Collective Plaintiffs for their hours worked in excess of forty hours per workweek. This violation was willful in that Defendants knew or should have known that such was due.

43. At all relevant times, the Defendants had a policy and practice of refusing to pay compensation to Plaintiff and FLSA Collective Plaintiffs for all hours they worked.

44. Records, if any, concerning the number of hours worked by Plaintiff and FLSA Collective Plaintiffs and the actual compensation paid to Plaintiff and FLSA Collective Plaintiffs should be in the possession and custody of the Defendants. Plaintiff intends to obtain these records by appropriate discovery proceedings to be taken promptly in this case and, if necessary, will then seek leave of Court to amend this Complaint to set forth the precise amount due.

45. Defendants failed to properly disclose or apprise Plaintiff and FLSA Collective Plaintiffs of their rights under the FLSA.

46. As a direct and proximate result of Defendants' willful disregard of the FLSA, Plaintiff and FLSA Collective Plaintiffs are entitled to liquidated (i.e., double) damages pursuant to the FLSA.

47. Due to the intentional, willful and unlawful acts of Defendants, Plaintiff and FLSA Collective Plaintiffs suffered damages in an amount not presently ascertainable of unpaid minimum wages, overtime wages, unpaid wage due to time shaving, plus an equal amount as liquidated damages.

48. Plaintiff and FLSA Collective Plaintiffs are entitled to an award of his reasonable attorneys' fees and costs pursuant to 29 U.S.C. §216(b).

COUNT II

VIOLATION OF THE NEW YORK LABOR LAW

49. Plaintiff realleges and reavers Paragraphs 1 through 48 of this class and collective action Complaint as if fully set forth herein.

50. At all relevant times, Plaintiff and Class members were employed by the Defendants within the meaning of the New York Labor Law, §§2 and 651.

51. Defendants willfully violated Plaintiff's and Class members' rights by failing to pay them minimum wage for hours they worked.

52. Defendants willfully violated Plaintiff's and Class members' rights by failing to pay them overtime compensation at the rate of not less than one and one-half times the regular rate of pay for each hour worked in excess of forty hours in a workweek.

53. Defendants willfully violated Plaintiff's and Class members' rights by failing to pay them compensation for all hours they worked.

54. Plaintiff and Class members regularly worked more than ten hours in a workday. Defendants willfully violated Plaintiff's and Class members' rights by failing to pay "spread of hours" premium to Plaintiff for each day he worked ten or more hours.

55. Defendants failed to provide a wage statement that satisfied statutory requirements under the NYLL. In addition, Defendants willfully failed to provide proper notice to employees, including hour and overtime rates, among others, at the beginning of employment and annually thereafter pursuant to the requirements of the New York Labor Law.

56. Due to the Defendants' New York Labor Law violations, Plaintiff and Class members are entitled to recover from Defendants unpaid minimum wage, unpaid overtime wage, unpaid wage due to time shaving, unpaid spread of hours premium, damages for unreasonably delayed payments, reasonable attorneys' fees, liquidated damages, statutory penalties and costs and disbursements of the action, pursuant to New York Labor Law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff on behalf of himself, FLSA Collective Plaintiffs and Class members, respectfully request that this Court grant the following relief:

a. A declaratory judgment that the practices complained of herein are unlawful under the FLSA and the New York Labor Law;

b. An injunction against Defendants and their officers, agents, successors, employees, representatives and any and all persons acting in concert with them as provided by law, from engaging in each of the unlawful practices, policies and patterns set forth herein;

c. An award of unpaid minimum compensation due under the FLSA and the New York Labor Law;

d. An award of unpaid overtime compensation due under the FLSA and the New York Labor Law;

e. And award of unpaid compensation due to time shaving under the FLSA and the New York Labor Law;

f. An award of unpaid "spread of hours" premium due under the New York Labor Law;

g. An award of statutory penalties as a result of Defendants' failure to comply with New York Labor Law notice and recordkeeping requirements;

h. An award of liquidated and/or punitive damages as a result of Defendants' willful failure to pay minimum and overtime compensation pursuant to 29 U.S.C. § 216;

i. An award of liquidated and/or punitive damages as a result of Defendants' willful failure to pay minimum compensation, overtime compensation and "spread of hours" premium pursuant to the New York Labor Law;

j. An award of prejudgment and postjudgment interest, costs and expenses of this action together with reasonable attorneys' and expert fees and statutory penalties;

k. Designation of Plaintiff as the Representative of the FLSA Collective Plaintiffs;

l. Designation of this action as a class action pursuant to F.R.C.P. 23;

m. Designation of Plaintiff as Representative of Class; and

n. Such other and further relief as this Court deems just and proper.

JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands trial by jury on all issues so triable as of right by jury.

Dated: June 2, 2014

Respectfully submitted,

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